

September 14, 2020

Via electronic submission: opinion.committee@oag.texas.gov

Ms. Virginia K. Hoelscher
Chair, Opinion Committee
Office of Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Re: Texas Hospital Association’s Brief in Response to Request Number 0371-KP: Whether Texas Occupations Code Chapter 157 Requires Physician Supervision after Delegation to Certified Registered Nurse Anesthetists

Dear Ms. Hoelscher:

On behalf of our more than 470 member hospitals and health systems, including rural, urban, children’s, teaching and specialty hospitals, the Texas Hospital Association submits this letter brief in response to Request No. 037-KP by the Texas Medical Board. Texas Hospitals routinely employ or otherwise use the services of certified registered nurse anesthetists to administer anesthesia. THA is an interested party because the TMB’s request directly impacts the processes in place related to the administration of anesthesia at Texas hospitals.

In 1999, the Executive Director of the Board of Nurse Examiners for the State of Texas asked the Texas Office of the Attorney General the same fundamental question about the administration of anesthesia by certified registered nurse anesthetists. Op. Tex. Att’y Gen. No. JC-0117 (1999). The response by then Attorney General Cornyn was clear and unequivocal: “[S]ection 157.058 does not require that a physician directly supervise a CRNA’s selection and administration of the anesthesia. Rather, the extent of physician involvement is left to the physician’s professional judgment in light of other relevant federal and state laws, facility policies, medical staff bylaws, and ethical standards.” *Id.* See Tex. Occ. Code § 157.058 (2020) (the applicable portion of the Texas Medical Practice Act). With no substantive changes in the law in the past 20 years, last year, the TMB attempted through the rulemaking process to enact a physician supervision component for CRNAs. Now, the TMB attempts do so through this request for statutory reinterpretation on a matter that is the subject of settled law.

The TMB has a history of attempting to impose a physician supervision requirement on CRNA’s where none exists by law. In 2019, the Texas Medical Board introduced Proposed Rule 193.13 which would have required, for the first time, “adequate physician supervision” for a physician to delegate to a certified registered nurse anesthetist.¹ 44 Tex. Reg. 6671 (Nov. 8, 2019). Faced with significant pushback from the provider community, the TMB pulled down its proposed rules. Request 0371-KP is framed by the TMB with arguments that gloss over section 157.058, Texas Occupations Code—a section that just one year ago the TMB thought necessary to modify through rulemaking with a new express supervision language. Section 157.058, Texas Occupations Code, sets out the entirety of the statutory delegation criteria for certified registered nurse anesthetists:

¹ Note that the TMB circulated proposed rule 193.21 to stakeholders prior to a public meeting that occurred at the TMB on Sept. 20, 2019.

- (a) In a licensed hospital or ambulatory surgical center, a physician may delegate to a certified registered nurse anesthetist the ordering of drugs and devices necessary for the nurse anesthetist to administer an anesthetic or an anesthesia-related service ordered by the physician.
- (b) The physician's order for anesthesia or anesthesia-related services is not required to specify a drug, dose, or administration technique.
- (c) Pursuant to the physician's order and in accordance with facility policies or medical staff bylaws, the nurse anesthetist may select, obtain, and administer those drugs and apply the medical devices appropriate to accomplish the order and maintain the patient within a sound physiological status.
- (d) This section shall be liberally construed to permit the full use of safe and effective medication orders to use the skills and services of certified registered nurse anesthetists.

Tex. Occ. Code § 157.058. Supervision is not a component of the section. Texas Attorney General John Cornyn agreed, stating:

The Medical Practice Act permits a physician to delegate anesthesia-related tasks to a CRNA without reference to supervision. Section 157.058 of the Occupations Code expressly allows a physician in a licensed hospital or ambulatory surgical center setting to “delegate” the ordering of drugs and devices to a CRNA. *Id.* § 157.058. Nothing in either the Nursing Practice Act or the Medical Practice Act requires a physician to “supervise” a CRNA's performance under section 157.058 of the Occupations Code. By contrast, other sections of the Medical Practice Act expressly mandate physician supervision of delegated functions.

Op. Tex. Att'y Gen. No. JC-0117. The rationale of the 1999 Attorney General Opinion is sound and based on the plain language of the law. Unlike the sections governing prescriptive authority agreements, facility-based practice and delegation to pharmacists, § 157.058 does not include an express requirement for supervision of CRNAs. *See* Tex. Occ. Code §§ 157.0512 (prescriptive authority agreements); 157.054 (facility-based practice); and 157.101 (delegation to pharmacists). Moreover, the statute specifically states “[t]his section shall be liberally construed to permit the full use of safe and effective medication orders to use the skills and services of certified registered nurse anesthetists.” Tex. Occ. Code § 158.058(d).

The current request for opinion attempts to tie delegation to a requirement for supervision. *See* RQ-0371-KP at 3–6. However, delegation and supervision are independent acts. Delegation is “[t]he act of entrusting another with authority or empowering another to act as an agent or representative.” DELEGATION, Black's Law Dictionary (11th ed. 2019). Supervision is “[t]he series of acts involved in managing, directing, or overseeing persons or projects.” SUPERVISION, *Id.* A physician who lacks confidence in the skills and ability of a CRNA can always choose not to delegate an act to the CRNA in the first place or cease delegation at any point in time. *See* Op. Tex. Att'y Gen. No. JC-0117 (“Of course, a physician need not delegate the selection or administration of anesthesia or the maintenance of an anesthetized patient in the first place.”).

Finally, the detrimental impact of the unsupported interpretation that physician supervision is required cannot be overstated. Many hospitals—especially rural hospitals—depend solely on certified registered nurse anesthetists to provide anesthesia services and treat patients in their communities. In fact, the majority of Texas' 254 counties do not even have an anesthesiologist practicing in the county. The practical effect of a requirement of physician

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supervision is that many Texas residents will not have access to obstetrical, surgical, and other health care services involving the administration of anesthesia in their communities. It is further conceivable that the inability to make these services available would lead to closings of rural hospitals, exacerbating the problem of access to health care in a state that already leads the nation in rural hospital closures since 2014. Limiting access to care, particularly during the COVID-19 public health emergency and at a time of a general relaxation of supervision by state and federal regulators to *promote* access to care could have disastrous consequence. THA urges the Office of the Texas Attorney General to let its 1999 opinion stand, instead of legislating a new supervision requirement into the Medical Practice Act.

Thank you for your consideration of this letter brief. Should you have any questions, please do not hesitate to contact me at cduncan@tha.org or 512/465-1539.

Respectfully submitted,



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Texas Hospital Association